Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

LEONARD ODELL CAZEY,

Petitioner,

versus

WAYNE SCOTT, DIRECTOR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

LEONARD ODELL CAZEY
Stiles Unit
Route 4, Box 1500
Beaumont, Texas 77705

Pro Se Petitioner

April 1995

24PP

QUESTIONS PRESENTED FOR REVIEW

(1) Whether the enhanced sentence with a prior burglary conviction for which he had received a full pardon rendered his trial fundamentally unfair and hence a denial of due process of law.

(2) Whether trial counsel was constitutionally ineffective for failing to examine properly two prospective jurors during voir dire examination.

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No. _____

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1994

LEONARD ODELL CAZEY,
Petitioner-Appellant,

verses

WAYNE SCOTT, DIRECTOR,
Respondent-Appellee.

PETITION FOR A WRITE OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Leonard Odell Cazey respectfully prays that a writ of certiorari issue to review an opinion and judgment of the United States Court of Appeals for the Fifth Circuit, which affirmed the judgment of the District Court's dismissal of his petition for a writ of habeas corpus.

OPINION BELOW

The opinion of the Court of Appeals is not reported and is reproduced as an Appendix to this petition at page A-1.

JURISDICTION

The opinion and judgment of the Court of Appeals were entered on December 19, 1994. A timely petition for rehearing was filed by Petitioner and overruled by the Court on January 23, 1994.

Petitioner invokes the Court's certiorari jurisdiction under 28 U.S.C. section 1651 (a). Filing of this petition was accomplished within 90 days of the Court of Appeals order overruling the petition for rehearing and was therefore timely under Rule 20.1 and 20.2 of this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner's federal constitutional claim is based upon the due process clause of the Fifth and Fourteenth Amendments.

The Fifth Amendment to the constitution provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases . . . nor shall any person be subject, compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . .

The Fourteenth Amendment to the constitution provides in relevant part as follows:

> All persons born on naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, without due process of law; . . .

STATEMENT OF THE CASE

Petitioner was indicted for attempted murder. Ther indictment included charges of a specific intent to commit murder with a deadly weapon and two enhancement paragraphs concerning two previous felony convictions. Petitioner was convicted and sentenced to life imprisonment.

SUMMARY OF THE ARGUMENT NO. 1

Petitioner asserts that he received a full pardon on February 18, 1967 and the state could not use what was no longer a prior conviction to enhance the attempted murder charge on November 11, 1988.

ARGUMENT

The decision of the Court of Appeals represents an unwarranted departure from settled Supreme Court precedent. In *Ex Parte Garland*, 4 Wall. 333,380 (1866), this Court held that "[A] pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out existence the guilt, so that in the eyes of the law the offender is as innocent as if he had never committed the offense.". In this e case, it has been twenty-one (21) years from the date of the full pardon and the conviction for attempted murder. In *Scott v. State*, 6 Tex. Civ. App. 343, 25 S.W. 337 (1894), the Court held that a pardon is a complete defense to disbarment proceedings based on the pardon offense.

The Court of Appeals, page A-8 stated that Petitioner does not produce for the record any evidence that his pardon was grounded on innocence. Respondent does not dispute the fact that Petitioner received a full pardon. Federal Rules of Evidence 609(c). Since the fact of the pardon was not in dispute, the Court of Appeals was in error, hence contributed to the fundamental unfairness of the sentence and denied him due process of law.

The decision of the Court of Appeals in this case dangerously erodes the principle that a significant component of the accused's right to a fair trial is the right to be tried only on the charge contained in the indictment and not on previous misconduct from which he had received a full pardon.

SUMMARY OF THE ARGUMENT NO. 2

Petitioner asserts that his trial counsel was constitutionally ineffective for failing to examine properly two prospective jurors during voir dire examination.

ARGUMENT

It is fundamental that a defendant is entitled to counsel Under the Sixth Amendment to the Constitution. The standard for ineffective assistance of counsel is governed by *Strickland v. Washington,* 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). To establish deficient performance, a defendant must show that his counsel's performance was so lacking that it fell below an objective standard of reasonableness. To establish prejudice, a defendant must show that his counsel's errors were so serious as to render the proceedings fundamentally unfair or unreliable. *Lockhart v. Fretwell,* ____ *U.S.* ____, ____. 113 S. Ct. 838, 844, 122 L. Ed. 2d 180 (1983). Petitioner contends that Cindy Lorraine Manley Corn was a "friend of the court" who had formally worked for the "Jail," and that Aline Carr Merryman was a "relation of family" The Court of Appeals found that a petitioner "provides neither a factual basis in the record nor an argument as the legal import of these unsupported allegations."

Since an objective standard of reasonableness is the test, having a citizen serve on the jury who formally worked as a jailer, and another who was related to the victim on the jury would objectively be unreasonable. Why, because the jailer based on her background would be prone to convict, a relative to the victim would also be out for revenge, rendering the proceedings fundamentally unfair, hence ineffective assistance of counsel at this critical stage of the trial. Trial

counsel might as well have been asleep during voir dire. *United States v. Javor,* 724 F. 2d 831 (9th Cir, 1984).

If there was no factual basis in the record, the Court of Appeals should have remanded the case to the District Court to conduct an evidentiary hearing on such a critical issue by failing to do so denied petitioner due process of law. The decision of the Appeals Court should be reviewed by this Court.

CONCLUSION

For all of the foregoing reasons, Petitioner Leonard Odell Cazey respectfully suggest that his petition for the writ of certiorari should be granted.

Respectfully submitted,

_____

Leonard Odell Cazey
No. 506777
Stiles Unit
Route 4, Box 1500
Beaumont, Texas 77705

Pro Se

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the _____ day of May, 1995.

_____

Leonard Odell Cazey

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

Civil No. W-93-CA-216

LEONARD ODELL CAZEY,
Petitioner,

v.

JAMES A. COLLINS,
Director, Texas Department
of Criminal Justice,
Institutional Division,
Respondent.

ORDER

A Notice of Appeal has been filed in the above-captioned habeas corpus case in which the detention complained of arises out of process issued by a state court. The Court, considering the record in the case and the requirement of FRAP 22(b), finds that there is probable cause for an appeal and the party appealing is a pauper.

SIGNED THIS _____ day of April, 1994.

WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50218

Summary Calendar

D. C. Docket No. W-93-CA-216

LEONARD ODELL CAZEY,
Petitioner-Appellant,

v.

WAYNE SCOTT, DIRECTOR
Respondent-Appellee

Appeal from the United States District
Court for the Western District of Texas

Before; SMITH, EMILIO M. GARZA, and PARKER,
Circuit Judges

JUDGMENT ORDER

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

December 19, 1994

ISSUED AS MANDATE: JAN 31 1995

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 94-50218

(Summary Calendar)

LEONARD ODELL CAZEY,
Petitioner-Appellant,

v.

WAYNE SCOTT, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION
Respondent-Appellee

Appeal from the United States District Court for the Western District of Texas
(W-93-CA-216)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges. PER CURIAM:*

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* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that his opinion should not be published.

Cazey was indicted for attempted murder. The indictment included charges of a specific intent to commit murder with a deadly weapon and two enhancement paragraphs concerning two previous felony convictions.[1] Cazey was convicted of attempted murder and sentenced to ninety-nine years imprisonment. On appeal, the state appellate court affirmed Cazey's conviction but vacated his sentence because the prosecutor's closing argument was improper. On resentencing, the jury determined that Cazey had used a deadly weapon during the comission of the offense, and that his was his third felony conviction. Based on those findings, the jury sentenced Cazey to life imprisonment.

Cazey challenged his conviction by filing seven state habeas corpus applications with the Texas Court of Criminal Appeals, which denied each petition.[2] Cazey then filed a federal habeas corpus petition, which the United States District Court denied on the merits after adopting the magistrate judge's report and recommendation. Cazey appealed the denial, and the district court granted a certificate of probable cause ("CPC") to appeal. He contends that 1) the evidence was insufficient to support his conviction for attempted murder; 2) the state indictment charging him with attempted murder was defective; 3) his sentence was improperly enhanced; 4) his counsel was constitutionally ineffective; and 5) his conviction raises double jeopardy and due process issues.[3]

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[1] Cazey had been convicted previously of felony driving while intoxicated ("DWI") and burglary.

[2] A habeas corpus petitioner must exhaust his remedies in the courts of the state. 28 U.S.C. § 2254(b) (1988). The State concedes that Cazey has exhausted his state remedies.

[3] Cazey contends on appeal that his conviction raises double jeopardy and due process issues. Cazey did not brief these issues, nor did he raise them before the district court. Although we liberally construe the briefs of *pro se* appellants, arguments must be briefed to be preserved. *Price v. Digital Equip. Corp*, 846 F. 2d 1026, 1028 (5th Cir. 1988). Generally, claims not argued in the body of the brief are abandoned on appeal, even when the appellant is

Cazey seeks habeas corpus relief, contending that his federal rights have been violated. A habeas corpus petitioner to whom the district court has defined relief may proceed on appeal only upon a substantial showing of the denial of a federal right. *Barefoot v. Estelle*, 463 U.S. 880, 893, 103 S. Ct. 3383, 3394, 77 L. Ed. 2d 1090 (1983).[4] Because the district court issued a certificate of probable cause, we address the merits of Cazey's petition. See *id.* at 893, 103 S. Ct. at 3395 (requiring review on the merits if CPC granted); see also 28 U.S.C. § 2253 (1988) (explaining certificate of probable cause procedure).

We review the district court's findings of fact on requests for habeas corpus relief for clear error; we review issues of law *ne novo*. *Williams v. Collins, 16 F.3d 626, 630 (5th Cir.), cert.* denied, ____ U.S. ____, 115 S. Ct. 42, 129 L. Ed. 2d 937 (1994). "A finding of fact made by the district court is clearly erroneous only when the reviewing court, after reviewing the entire evidence, is left with the definite and firm conviction that a mistake has been committed." *Id.*

Cazey contends first that the evidence presented to the jury was insufficient to support his conviction for attempted murder. "In a habeas action alleging insufficient evidence, we review the evidence in the light most favorable to the government to determine whether any rational jury could have found the essential elements of the crime beyond a reasonable doubt." *Peters v. Whitley*, 942 F.2d 937, 941 (5th Cir.

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proceeding *pro se*. See *Yohey v. Collins, 985 F.2d 222, 224-25 (5th cir. 1993)*. Further, this court does not address issues by the district court. *Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991)*. Consequently, Cazey presents no reviewable double jeopardy or due process issues.

[4] This standard does not require the petitioner to show that he should prevail on the merits, only that the issues may be differently, or the issues may be debated among jurists a court could resolve the issues differently, or the issues deserve a higher court's consideration. *Id.* at 893 n.4, 103 S. Ct. at 3394 n.4.

1991), *cert. denied*, ____ U.S. ____, 112 S. Ct. 1120, 117 L. Ed. 2d 457 (1992). A sate appellate court's determination on the sufficiency of the evidence for a conviction warrants great weight in a federal habeas review. *Porretto v. Stalder*, 834 F.2d 461, 367 (5th Cir. 1987).

To convict a defendant of attempted murder under Texas law, the state must prove that the defendant acted with the intent to cause the death of another, and that the performance of the act constituted more than mere preparation for the offense. See Tex. Penal code Ann. §15.01(a), 19.01(a) (West 1994). The prosecutor presented both the victim's testimony and objective evidence at trial. Ricky Green testified that he had driven his truck to a gate near Cazey's trailer home, on his way to his in-laws' trash dump, when Cazey came out of his trailer home and threatened to shoot Green if he went through the gate. Green testified that he told Cazey that he could go through the gate if he wanted to, and that Cazey then picked up a rifle and fired several shots at him. The evidence showed that there were multiple bullet holes located in and around the passenger-side door of Green's truck, and that bullets had landed within inches of Green's body. Based on Green's testimony and the objective evidence, the state appellate court affirmed Cazey's conviction. We hold that this evidence is sufficient for a rational jury to convict Cazey beyond a reasonable doubt.

Cazey next argues that the indictment was insufficient to charge him with attempted murder. He argues specifically that he indictment failed to charge him with an offense because it did not allege that he fired his rifle at the victim, and that he indictment's charge that he fired "a gun" did not amount to a charge that he used a deadly weapon under Texas law. "the sufficiency of a state indictment is not a matter for federal habeas corpus relief unless it can be shown that the indictment is so defective that the convicting court had no

jurisdiction." *Branch v. Estelle*, 631 F.2d 1229, 1233 (5th Cir. 1980); see also *Alexander v. McCotter*, 775 F.2d 595, 598 (5th Cir. 1985). Moreover, the question of whether a defective indictment deprived the trial court of jurisdiction is foreclosed to a federal court reviewing a habeas corpus petition when the state courts have held that the indictment is sufficient under state law. *Millard v. Lynaugh*,, 810 F.2d 1403, 1407 (5th Cir., *cert. denied*, 484 U.S. 838, 108 S. Ct. 122, 98L Ed. 2d 81 91987); *Liner v. Phelps*, 731 F. 2d 1201, 1203 (5th Cir. 1984).

Cazey's indictment charged that "on or about the 11th day of November, A.D. 1988 . . . [Cazey] with the specific intent to commit the offense of murder, did . . . attempt to cause the death of an individual, Ricky Green, by shooting with a gun . . . ." An indictment is sufficient under Texas law when it alleges the elements of the crime. *Alexander v. McCotter*, 775 F.2d 595, 599 (5th Cir. 1985). The state habeas court held that "[t]he charging paragraph, deadly weapon paragraph, and each of the two enhancement paragraphs were adequately phrased and sufficiently proved at trial." *Ex Parte Cazey*, No 21,992-07. Accordingly, because the state court found the indictment sufficient, we may not review the sufficiency of Cazey's indictment.

Cazey also contends that the jury improperly used two prior felony convictions as the basis for enhancing his sentence. He argues first that a priori DWI conviction should not have been used to enhance his sentence because the cause number of the conviction set forth in the indictment differed from that which the prosecutor proved at trial. A variance between prior conviction charged in an indictment's enhancement paragraph and the prosecutor's proof of the same prior conviction at the punishment phase of trial will not require reversal unless it causes surprise to the prejudice of the defendant. An enhancement count in the attempted

murder indictment charged that Cazey was convicted of felony DWI in the 20th District Court of Robertson County, Cause No. 12,532. At trial, the prosecutor introduced evidence that showed Cazey was convicted of felony DWI in Cause no. 12,542. Obvious typographical variances are unlikely to cause prejudicial surprise to a defendant. *Cole v. State, 611* S.W.2d 79, 82 (Tex. Crim. App. 1981) holding that a transpositional error in cause numbers did not prevent defendant from locating prior record and presenting defense to enhancement allegation). Both the trail court and the state appellate court addressed this issue and found that Cazey did not show t hat the variance surprised him to his prejudice. We accord a presumption of correctness to the findings of the state courts unless the petitioner implicates particular statutory exceptions to 28 U.S.C. 2254(d). *Williams v. Collins,* 16 F.3d 626, 631 (5th Cir.), *cert. denied,* ____ U.S. ____, 115 S. Ct. 42, 129 L. Ed. 2d 937 (1994).[5] Cazey does

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[5] 28 U.S.C. § 2254(d) provides, in relevant part, that a federal court will presume that a state court's finding on a factual issue is correct unless a petitioner establishes:

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the fact finding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction on the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced . . . , and the Federal Court on a consideration of such part of the record as a whole

not contend that any of the § 2254(d) exceptions are applicable to this issue; consequently, we presume that the state court's findings are correct.[6]

Cazey next argues that the jury improperly enhanced his sentence with a prior burglary conviction for which he had received a full pardon. However, Cazey does not produce for the record any evidence that his pardon was grounded on innocence. Therefore, even if Cazey were pardoned for his prior burglary conviction, the state in subsequent cases may use the fact of the conviction to demonstrate that he is a repeat or habitual offender. See *Watkins v. Thomas*, 623 F.2d 387, 388 (5th Cir. 1980) (holding that convictions pardoned for reasons other than innocence may be introduced at sentencing and used to enhance sentence), *cert. denied*, 449 U.S. 1065, 101 S. Ct. 791, 66 L. Ed. 2d 608 (1980).[7]

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concludes that such factual determination is not fairly supported by the record . . . .

[6] Cazey also argues that the absence of a statement of facts for his prior felony DWI conviction renders it unavailable to enhance his sentence, but he provides no authority for this assertion. Arguments must be briefed to be preserved. *Price v. Digital Equip. Corp.*, 846, F.2d 1026, 1028 (5th Cir. 1988). Consequently, Cazey has failed to preserve this issue for appeal.

Cazey further argues that the felony DWI conviction should not have provided for enhancement of this sentence because his counsel in that case was also a county judge and therefore had a conflict of interest. Cazey presents no facts from the record demonstrating why a conflict of interest existed. Because mere conclusional allegations cannot form the basis of habeas corpus relief, *Schlang v. Heard*, 691 F.2d 796, 799 (5th Cir. 1982), *cert. denied*, 461 U.S. 951,103 S. Ct. 2419, 77L. Ed. 2d 1310 (1983), Cazey presents no cognizable issue for review on this point.

[7] Cazey also argues that the burglary conviction should not have enhanced his sentence because he was not represented by counsel at a probation hearing connected with that conviction. They record, however, reveals that Cazey was represented by an attorney at the hearing. Therefore, Cazey's argument lacks a factual basis.

Cazey argues further that the burglary conviction should not have enhanced his sentence because his counsel was constitutionally ineffective in failing to appeal that conviction. This issue was not raised before the district court. We do not review issues raised for the first time on appeal unless the issues concern purely legal questions and manifest injustice would result if we

Cazey further contends that his counsel as constitutionally ineffective for failing to examine properly two prospective jurors during voir dire examination. To establish a claim of ineffective assistance of counsel, a defendant must demonstrate both that his attorney's performance was deficient and that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). To establish deficient performance, a defendant must show that his counsel's performance was so lacking that it fell below an objective standard of reasonableness. *Id.* at 687-88, 104 S. Ct. at 2064. However, we "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional competence." *Bridge v. Lynaugh*, 838 F.2d 770, 773 (5th Cir. 1988). To establish prejudice, a defendant must show that his counsel's errors were so serious as to render the proceedings fundamentally unfair or unreliable. *Lockhart v. Fretwell*, ____ U.S. ____, ____, 113 S. Ct. 838, 844, 122 L. Ed. 2d 180 (1983). Cazey contends that Cindy Lorraine Manley Corn was a "friend of the court" who had formerly worked for the "jail," and that Aline Carr Merryman was a "relation of family," but he provides neither a factual basis in the record nor an argument as to the legal import of these unsupported allegations. Consequently, Cazey has failed to demonstrate that his attorney's performance was defective.[8]

For the foregoing reasons, we AFFIRM on the merits the decision of the district court.

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failed to consider them. *Varnado v. Lynaugh*, 920 F.2d 320, 321 (5th Cir. 1991).

[8] Moreover, even assuming defective representations,, Cazey does not show how it rendered the proceedings fundamentally unfair or unreliable. Cazey's contention accordingly fails both *Strickland* requirements.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50218

LEONARD ODELL CAZEY,
Petitioner-Appellant,

v.

WAYNE SCOTT, DIRECTOR
Respondent-Appellee

Appeal from the United States District
Court for the Western District of Texas

Before; SMITH, EMILIO M. GARZA, and PARKER,
Circuit Judges

ON PETITION FOR REHEARING
(January 23, 1995)

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

United States Circuit Judge